



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 83 OF 2016**

**SAMSON MACHESO MASAI.....PLAINTIFF**

**VERSUS**

**JOHN MACHESO MAFUNGA & PATRICK MAFUNGA KHWATENGE**

**(sued as the Administrators of the Estate of the late JOTHAM MAFUNGA MACHESO....1<sup>ST</sup> DEFENDANT**

**JOAB SIUNDU MACHESO.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1. This is yet another of those land disputes in which the combatants are siblings. Such family disputes are best resolved outside the Courts through alternative forms of dispute resolution mechanism. The family enjoys Constitutional recognition and **Article 45(1)** of the thereof provides that: -

***45(1) "The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state."***

It is in recognition of this pivotal role which the family plays in society that I, and I believe other Judicial Officers, always encourage that family disputes be resolved through other fora that are less toxic than Courts. And I believe that is why the framers of the **Constitution 2010** had in mind when they provided under **Article 159(2)(c)** that: -

***"In exercising Judicial authority, the Courts and tribunals shall be guided by the following principles: -***

***(a)***

***(b)***

***(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);"***

**Section 3(2)** of the **Judicature Act** is also instructive. It reads: -

***3(2) "The High Court, the Court of Appeal and all Subordinate Courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."***

Finally, **Section 20** of the **Environment and Land Court Act 2011** provides that:-

***20(1) "Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.***

***(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled."***

The Court cannot however force family members to pursue out of Court settlements to their disputes. All that the Court can do is to **encourage** and **promote** such litigants to consider alternative dispute resolution mechanisms where possible. I must add that the Bar in Bungoma has been very supportive in that regard. I commend them for that.

2. During his life – time, **MACHESO MASAI** (hereinafter **MASAI**) had four sons from his five wives. These are **JOTHAM MAFUNGA MACHESO** (the 1<sup>st</sup> defendant but now deceased and substituted with his sons **JOHN MACHESO MAFUNGA** and **PATRICK MAFUNGA KHWATENGE**), **CHRISTOPHER KISAKA**, **JOAB SIUNDU MACHESO** (the 2<sup>nd</sup> defendant) and **SAMSON MACHESO MASAI** (the plaintiff). It is not clear how much land the late **MASAI** had prior to his death in 1945. The plaintiff suggests that his late father “*had a jungle of piece of land measuring 229 acres.*” However, that is denied by the 2<sup>nd</sup> defendants who in paragraph 9 of his statement dated 8<sup>th</sup> November 2019 says: -

**9: “That to the best of my knowledge, my father MASAI MACHESO never owned land measuring 229 acres as alleged by the plaintiff.”**

This Court has no idea of how much land the late **MASAI** actually owned because no documents of ownership have been availed by the parties. However, what is in contention in this case is the land parcel **NO NDIVISI/MUCHI/1079** measuring 14.8 Hectares (36.5 acres) registered in the names of the 1<sup>st</sup> defendant and land parcel **NO NDIVISI/MUCHI/1621** measuring 20.16 Hectares (49.6 acres) registered in the names of the 2<sup>nd</sup> defendant (the suit land).

3. By a plaint filed herein on 19<sup>th</sup> August 2016, the plaintiff sought Judgment against the defendants jointly and severally in the following terms: -

**1. A declaration that the defendants hold the land parcels NO NDIVISI /MUCHI/1079 and 1621 respectively in trust for the plaintiff for a share of 10 acres and 5 acres in the above referenced parcels respectively.**

**2.The defendants be ordered to carve out 10 and 5 acres from their respective parcels of land NO NDIVISI/MUCHI/1079 and 1621 respectively and sign the transfer forms in favour of the plaintiff and in default, this Honourable Court do authorize the Deputy Registrar to sign the relevant transfer forms and application for consent for and on behalf of the defendants herein.**

**3. Costs of this suit.**

**4. Any other suitable or alternative relief this Honourable Court may deem fit and just to grant.**

The basis of the plaintiff’s case is that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are registered as proprietors respectively of the land parcels **NO NDIVISI/MUCHI/1079** and **1621** which was originally part of the 229 acres of land which belonged to their late father **MASAI** and is therefore part of his inheritance held in trust for the plaintiff and defendants. That during the adjudication and registration process, the plaintiff was gainfully employed in Uganda and the defendants fraudulently registered themselves as proprietors of the suit land without disclosing the plaintiff’s interest therein. The fraud was discovered by the plaintiff in 2010 when he approached the defendants for his share of their late father’s land.

4. The particulars of fraud are pleaded in paragraph 8 of the plaint as follows: -

**(a) Presenting themselves to the Land Adjudication Committee as the sole beneficiaries of the land parcels NO NDIVISI/MUCHI/1079 and 1621 respectively.**

**(b) Fraudulently obtaining clearance from the Land Adjudication Committee as the sole owners of the land parcels NO NDIVISI/MUCHI /1079 and 1621.**

**(c) Concealing material facts to the Land Adjudication Committee that the plaintiff was entitled to 10 and 5 acres out of the land parcels NO NDIVISI/MUCHI/1079 and 1621 respectively.**

**(d) Failing to disclose to the Land Adjudication Committee that they held land parcels NO NDIVISI/MUCHI/1079 and 1621 respectively in trust for the plaintiff said themselves.**

**(e) Generally acting in a dishonest manner.**

**(f) Registering themselves as sole owners of the land parcels NDIVISI/MUCHI/1079 and 1621 respectively without disclosing the interest of the plaintiff.**

It is the plaintiff’s case that the defendants hold the suit land in trust for themselves and the plaintiff who is entitled to 10 and 5 acres respectively from the defendants’ shares.

5. In support of his case, the plaintiff recorded two statements the first dated 2<sup>nd</sup> August 2016 and the second dated 3<sup>rd</sup> March 2020. It is his testimony as can be gleaned from the two statements that his late father **MASAI** who died in 1945 owned five different parcels of land whose total acreage was 229 acres. That his father died before the land adjudication process but during the “**LUFU**” ceremony, the clan gave the 1<sup>st</sup> defendant powers to hold the suit land in trust for all the children including the plaintiff who was then six years old. That in

1958, the plaintiff went to work in Uganda and returned in 1960 for purposes of marrying but when he asked the 1<sup>st</sup> defendant as elder brother for his share of land, he was directed to the 2<sup>nd</sup> defendant who however told him that he (2<sup>nd</sup> defendant) had no power to share out the land and referred him back to the 1<sup>st</sup> defendant. It was then that the plaintiff discovered that his siblings had shared their father's land as follows: -

(a) **JOTHAM MAFUNGA – 88 acres**

(b) **CHRISTOPHER KISAKA – 64 acres**

(c) **JOAB SIUNDU – 77 acres**

In 1961, the plaintiff sought the assistance of the Chairman of their clan one **JAIRO MULUMIA** and approached the 2<sup>nd</sup> defendant for his share of the land but they were chased away. The clan Chairman therefore decided to hive off a parcel measuring 3 acres from the 1<sup>st</sup> defendant's land for the plaintiff who then returned to Uganda where he continued to work until 1975 when he returned home and purchased land at **MATULO VILLAGE** where he lives with his family and in 2011 he filed a case at the **WEBUYE LAND DISPUTES TRIBUNAL** (the **TRIBUNAL**) against his three siblings **JOTHAM MAFUNGA** (1<sup>st</sup> defendant) **CHRISTOPHER KISAKA** and **JOAB SIUNDU** (2<sup>nd</sup> defendant). The **TRIBUNAL** decided the dispute in his favour and directed the defendants to give him 10 and 5 acres respectively. That verdict was however challenged at the **HIGH COURT BUNGOMA** but to – date, he has not received his share of the land.

6. In his statement dated 3<sup>rd</sup> March 2020, he denied having been given 10 acres by the defendants which he sold to **PETER KHAKAME**. He also denied that the 2<sup>nd</sup> defendant was only given 5 acres or that the other land he (the 2<sup>nd</sup> defendant) obtained following disputes. He added that the parcels of land which he bought from **HUDSON SIMIYU KITILA** and **JOHN NYONGESA KHWATENGE** were proceeds of his earnings in Uganda.

7. The plaintiff filed a statement of his witness **KUNDU MUYUNDO** but during the trial, the Court was informed that he had suffered a stroke and so he did not testify.

8. The plaintiff however filed the following documentary evidence: -

1. **Certificate of Search in respect of the land parcels NO NDIVISI/ MUCHI/1079 and 1621.**

2. **Proceedings in WEBUYE LAND DISPUTES TRIBUNAL CASE No 3 of 2011.**

The defendants filed a joint statement of defence on 26<sup>th</sup> September 2016 in which they denied that they are registered as proprietors of the suit land in trust for themselves and the plaintiff. They further denied that in 2010, the plaintiff had approached them for his share of the inheritance due to him from their father **MASAI** who had died in 1945. They also denied that they were registered as proprietors of the suit land fraudulently and put the plaintiff to strict proof thereof. The defendants denied further that the plaintiff is entitled to 10 and 5 acres respectively from the defendants' land. They added that the award of the **TRIBUNAL** was quashed by the **HIGH COURT** vide **JUDICIAL REVIEW APPLICATION No 145 of 2011**. Finally, the defendants pleaded that the plaintiff's suit contravenes the provisions of **Section 7** of the **Limitation of Actions Act** and is also res – judicata in view of the **TRIBUNAL**'s award in case **NO 3 of 2011** and also the decision of the **HIGH COURT BUNGOMA** in **JUDICIAL REVIEW CASE No 145 of 2011**. The defendants therefore pleaded that the plaintiff's suit be dismissed with costs.

9. In a reply to defence filed on 19<sup>th</sup> October 2016, the plaintiff reiterated that the defendants hold the suit land on their own behalf and also on his behalf and that he is therefore entitled to the land as sought herein. He added that the **JUDICIAL REVIEW** proceedings were only concerned with whether the **TRIBUNAL** had jurisdiction to entertain the claim before it.

10. Following his demise, the 1<sup>st</sup> defendant (**JOTHAM MAFUNGA MACHESO**) was substituted with his sons **JOHN MACHESO MAFUNGA** and **PATRICK MAFUNGA KHWATENGE** who recorded their statements on 19<sup>th</sup> October 2019.

11. In his statement **JOHN MACHESO MAFUNGA (DW 1)** confirms that he is the personal representative of the Estate of his later father who is the registered proprietor of the land parcel **NO NDIVISI/MUCHI/1079** measuring approximately 14.8 Hectares. He confirms further that his late father had four sons including the deceased **JOTHAM MAFUNGA MACHESO**, **CHRISTOPHER KISAKA MACHESO**, the 2<sup>nd</sup> defendant and the plaintiff. That in 2011, the plaintiff lodged a case at the **TRIBUNAL** which ruled that **JOTHAM MAFUNGA MACHESO** and the 2<sup>nd</sup> defendant should each give the plaintiff 10 and 5 acres respectively. That the 2<sup>nd</sup> defendant was dissatisfied with the **TRIBUNAL**'s award and moved to the **HIGH COURT** in **BUNGOMA** which quashed that decision. He denied that his late father **MASAI** owned 229 acres of land as alleged by the plaintiff. He also denied that his late father had sold to one **VIESA WAMUME** 7 acres and to one **KANGALA** 21 acres. He added further that the plaintiff, upon receiving 10 acres from **JOTHAM MAFUNGA MACHESO**, sold it to **PETER WANYAMA KHAKAME**. He therefore accused the plaintiff of falsehoods and lying when he claims not to have received his share of the ancestral land.

12. The statement of **JOHN MACHESO MAFUNGA (DW 1)** was repeated verbatim by his brother **PATRICK MAFUNGA KHWATENGE (DW 2)**.

13. In his statement dated 8<sup>th</sup> November 2019, **JOAB SIUNDU MACHESO (DW 3)** the 2<sup>nd</sup> defendant herein confirms that the plaintiff, the deceased **JOTHAM MAFUNGA MACHESO** and **CHRISTOPHER KISAKA MACHESO** are siblings being the sons of the late **MASAI**. That in 2011, the plaintiff lodged a case at the **TRIBUNAL** against his siblings and was awarded 10 acres to be hived from the

land of **JOTHAM MAFUNGA MACHESO** and another 5 acres to be hived from the 2<sup>nd</sup> defendant's portion. That being dissatisfied with the award, the 2<sup>nd</sup> defendant lodged **JUDICIAL REVIEW PROCEEDINGS** vide **BUNGOMA HIGH COURT CIVIL APPLICATION No 145 of 2011** and the proceedings were quashed. That he is the registered proprietor of the land parcel **NO NDIVISI/MUCHI/1621** which measures 20.16 Hectares which is equivalent to 50.4 acres and not 77 acres as alleged by the plaintiff. That **MASAI** did not own 229 acres of land as alleged by the plaintiff and neither did **JOTHAM MAFUNGA** sell to one **VIESA WAMUME** and one **KANGALA** portions of land measuring 7 acres and 21 acres respectively. That to his knowledge, the plaintiff was given land by the clan which included the grave of their late father **MASAI** but instead sold it to one **PETER WANYAMA KHAKAME** and bought land in **MATULO** area where he lives. That the plaintiff has raised a lot of falsehoods and the 2<sup>nd</sup> defendant was only allocated 5 acres and that the rest of the land he obtained through his own sweat and struggle. That the plaintiff is a liar when he claims not to have been given part of the ancestral land. That the land which he occupies has been shared among his children and he has no land to give to the plaintiff and neither does he hold any land in trust for him and this case is an afterthought being filed 50 years later.

**14. PETER WANYAMA KHAKAME (DW 4)** filed an affidavit dated 16<sup>th</sup> January 2019 in which he summarized his education and career including the fact that he served in the Uganda Police Force during the reign of **PRESIDENT AMIN DADA**. That he knows the plaintiff well as he is his maternal cousin their mothers being sisters. That when he returned home in 1959 on his annual leave from Uganda, the plaintiff requested him to take him along back to Uganda where he secured for him a job as a petrol attendant. In 1960, they both returned back home and in 1961, the plaintiff married senior Chief **SUDI NAMACHANJA**'s daughter. That the plaintiff later told him that it was **JOTHAM MAFUNGA** who had paid for him the dowry and even gave him 10 acres of land at **MARAKA** village where the plaintiff intended to put up his homestead. But before he could put up his home, **JOTHAM MAFUNGA**'s wife died and the plaintiff was accused to have had a hand in the death. The plaintiff therefore approached him to get a buyer for the 10 acres and since he was interested, he purchased it himself. That they prepared a written agreement which was however destroyed when his house in **TURBO** was burnt during the 1992 land clashes. That he sold the 10 acres in 1983 and 1985 and relocated to **UASIN GISHU**. That he confirms that the plaintiff was given 10 acres but sold it.

**15. JACKSON MUSUNGU MIKISI (DW 5)** also recorded an affidavit dated 12<sup>th</sup> January 2019 in which he stated that in 1960 he was the village elder of the larger **WEBUYE** and served until 2014 when he retired. He recalled that in 1961 the plaintiff asked him to accompany him to the **BUYAMBU CLAN** for purposes of sharing land. That they proceeded to the homestead of **JOTHAM MAFUNGA** where they found several people including the clan Chairman one **CHAIRO MULUMIA**. When **JOTHAM MAFUNGA** was asked about the land, he referred them to the 2<sup>nd</sup> defendant. They therefore proceeded to **NANG'ENI** area to meet the 2<sup>nd</sup> defendant who however became hostile and so they returned to the home of **JOTHAM MAFUNGA** where the plaintiff was allocated 10 acres (then known as 10 Baringos) and which included the grave of **MASAI**. That the plaintiff never complained and said he was satisfied. Then in December 1961, the plaintiff informed him that he was selling the 10 acres to his maternal cousin **PETER WANYAMA KHAKAME** and had been paid the purchase price of 20 heads of cattle in full. That he is aware that the 20 heads of cattle were utilized by the plaintiff to purchase land at **MATULO** area from one **HUDSON SIMIYU KATILA**. That during the Land Adjudication and Registration process in 1965, the 10 acres was registered in the names of **PETER WANYAMA KHAKAME** and no complaint was raised by the plaintiff until 2011 when he filed a case at the **TRIBUNAL**.

**16.** The defendants filed two lists of documentary evidence. The first list dated 2<sup>nd</sup> June 2017 and filed on 5<sup>th</sup> June 2017 contained the following: -

- 1. Proceedings in BUNGOMA HIGH COURT JUDICIAL REVIEW CASE No 145 of 2011.**
- 2. Order in BUNGOMA HIGH COURT JUDICIAL REVIEW CASE No 145 of 2011.**

The second list dated 24<sup>th</sup> September 2016 and filed on 26<sup>th</sup> September 2016 had the following: -

- 1. Certificate of Official Search for land parcel NO NDIVISI/MUCHI/ 1079.**
- 2. Certificate of Official Search for land parcel NO NDIVISI/MUCHI/ 1621.**
- 3. Judgment in BUNGOMA HIGH COURT JUDICIAL REVIEW CASE No 145 of 2011.**

And although one **HUDSON SIEKULA KISAKA** was listed as a defence witness, he did not testify.

**17.** Prior to the hearing, the defendants' plea that this suit is caught up by the provisions of **Section 7** of the **Limitation of Actions Act** and is also res – judicata was canvassed as a Preliminary Objection. In a ruling delivered on 31<sup>st</sup> July 2018, I held that the plaintiff's suit was neither statute barred nor res – judicata and proceeded to dismiss the defendants' Preliminary Objection with costs.

**18.** With hindsight, I ought not to have condemned the defendants to meet the costs of the Preliminary objection this being a family dispute. I hereby suo – moto vacate the order on costs and substitute it with an order that each party meets their own costs.

**19.** The hearing commenced on 27<sup>th</sup> May 2021 and the plaintiff was the only witness in support of his case. He was led by **MR MURUNGA** and adopted as his testimony the witness statement referred to above and also produced the list of documents as his documentary evidence.

**20.** The defendants prosecuted their case from 28<sup>th</sup> June 2021 to 21<sup>st</sup> September 2021. They too, led by their counsel **MR MAKOKHA**, adopted as their testimony the contents of their statements and produced as their documentary evidence the documents filed herein and also called their witnesses who similarly adopted the contents of their affidavits.

21. Submissions were thereafter filed both by **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the plaintiff and by **MR MAKOKHA** instructed by the firm of **MAKOKHA, WATTANG'A & LUYALI ASSOCIATES ADVOCATES** for the defendants.

22. I have considered the evidence by the parties including the documents filed as well as the submissions by Counsel.

23. Although the defendants' Counsel has submitted in paragraph 16 of his submissions that the parties filed a joint statement of agreed issues dated 4<sup>th</sup> March 2020, I did not see any such statement of agreed issues. The only statement of issues in the file are dated and filed on 3<sup>rd</sup> March 2020 and are signed only by the plaintiff's Counsel.

24. In my view, I consider the following to be the issues calling for my determination in this matter: -

1. **Whether the suit land was originally part of ancestral land belonging to MASAI the deceased father to the parties herein or private property.**
2. **Whether the defendants fraudulently registered the suit land in their names without disclosing the plaintiff's interest therein.**
3. **Whether the defendants hold the titles to the suit on their behalf and also on behalf of the plaintiff.**
4. **Whether the plaintiff is entitled to 10 acres and 5 acres respectively from the land parcels NO NDIVISI/MUCHI/1079 and 1621.**
5. **Who shall meet the costs of the suit.**

It is common ground that the parties are siblings being the only sons of **MASAI** but from different mothers. And although the parties have differed as to the exact extent of **MASAI**'s land, it is clear that the suit land is part of what he owned prior to his death in 1945 long before the Land Adjudication and Registration process had commenced. That explains the dearth of information as to how much land the late **MASAI** actually owned. But bearing in mind the fact that two out of his four sons are registered proprietors of 85 acres of land, the late **MASAI** certainly owned a large Estate by any standards. I did not hear any of the defendants claim to have bought the suit land. Indeed, there was consensus that the suit land was their respective share of what originally belonged to their father **MASAI**. The defendants' case is that the plaintiff similarly got his share of 10 acres which he sold to **PETER WANYAMA KHAKAME (DW 4)**. It is therefore clear that the suit land is part of what was ancestral land occupied by **MASAI** for the benefit of his family which includes the parties herein. Ancestral property is defined in **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** as: -

***"Property, esp, immovable property, that the present owner has acquired from forebears, esp when the owner's family has held the property for several generations at least."***

This Court finds that in all probabilities, if **MASAI** was alive during the Land Adjudication and Registration period, all the land from which the suit land was hived would have been registered in his names. He would then have shared it among his family including the parties herein as he wished. The suit land was therefore not acquired by the defendants as private property. They inherited it from their father **MASAI**.

25. Having inherited the suit land from their late father **MASAI**, the defendants and their other siblings who also benefited by acquiring part of the ancestral land were obliged to make a full disclosure during the Land Adjudication and Registration process and ensure that equity prevailed and that even the plaintiff, who was the youngest of the four sons, got his rightful share. That was obviously not disclosed to the Land Adjudication Committee and the registration of the suit land in the sole names of the defendants is clear evidence of fraud on their part as pleaded in paragraph 8 of the plaint. It is my finding that the allegations of fraud have been established to the required standard as set out in the case of **CENTRAL BANK OF KENYA .V. TRUST BANK LTD & OTHERS C.A CIVIL APPEAL No 215 of 1996** among other cases. It is a fact that whereas the defendants have title documents to show for their inheritance of the ancestral land, the plaintiff has nothing to show. Even the 10 acres that the 1<sup>st</sup> defendant is said to have given him, (the plaintiff says it was in fact only 3½ acres and it was given to him by the village elders), appears to have come from the 1<sup>st</sup> defendant's share. It was as if the 1<sup>st</sup> defendant was telling him: -

***"Young man, you have made too much noise. Take this and shut up."***

The plaintiff was not seeking any gratuitous reward from the defendants. Far from it. He was seeking what was justifiably his share of his father's land.

26. I have no doubt in my mind that the defendants hold the suit land in trust for both themselves and the plaintiff. Although the defendants are the registered proprietors of the suit land, it is clear from **Section 25 of the Land Registration Act** that such registration does not relieve the defendants from any duty or obligation to which they are subject as trustees. A similar provision existed in the repealed **Registered Land Act** under which the suit land was registered in the 1970's. The above has been affirmed by superior Courts in many cases including **KANYI .V. MUTHIORA 1984 KLR 712**. As I have already stated above, the suit land is ancestral land. It was not purchased by the defendants as their own personal property. Addressing a similar scenario in **MBUI MUKANGU .V. GERALD MUTWIRI MBUI C.A CIVIL APPEAL No 281 of 2000 [2004 eKLR]**, the Court of Appeal held thus: -

***"It is significant, we think, that unlike the MURIUKI MARIGA case (supra) where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of MBUI was ancestral land that devolved to him on the***

**death of his father. It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept intergenerational equity where the land is held by one generation for the benefit of succeeding generations.”**

The same argument applies here. The original land was ancestral land held by **MASAI** under custom for the benefit of his family and future generations. Therefore, any subsequent dealing with the land including the subsequent sub – division and registration by the defendants should have been done within that background. My evaluation of the history of the suit land is sufficient to justify a finding that the plaintiff has proved a customary trust against the defendants in relation to the suit land.

27. In **ISACK M’INANGA KEBIA .V. ISAAYA THEURI M’INTARI & ANOTHER 2018 eKLR**, the Supreme Court stated that some of the factors which a Court considering a claim based on a customary trust will take into account include: -

1. **Whether the land in question before the registration was family, clan or community land.**
2. **Whether the claimant belongs to such family clan or community.**
3. **The relationship of the claimant to such family, clan or group and whether it is so remote and tenuous and to make the claim idle or adventurous.**

The evidence in this case clearly demonstrates that the plaintiff has been able to establish such a claim.

28. Further, having found that the defendants fraudulently registered themselves as proprietors of the suit land without acknowledging the plaintiff’s interest therein, I am persuaded that the defendants are also constructive trustees holding it in trust for themselves and the plaintiff. A constructive trust is defined in **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION** as: -

**“An equitable remedy by which a Court recognizes that a claimant has a better right to certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property to which the wrongdoer gains title.”**

In **TWALIB HATAYAN TWALIB HATAYAN & ANOTHER .V. SAID SAGGAR AHMED AL HEIDY 2015 eKLR**, the Court of Appeal said the following about a constructive trust: -

**“If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his positions for his own benefit.”**

The defendants are the registered proprietors of the suit land. However, the manner in which they obtained ownership thereof makes them constructive trustees holding the titles in trust for both themselves and the plaintiff.

29. Counsel for the defendants has submitted that since the plaintiff has never been in occupation of the suit land, he cannot rely on any customary rights. This is how Counsel has addressed the issue in paragraph 21 of his submissions: -

**“The plaintiff herein could only have rights over the defendants’ land as an overriding interest if he was in possession and actual occupation of part of the land. In absence of such there is no customary rights disclosed.”**

It is true that the plaintiff went to Uganda in 1958 and by the time he returned to Kenya, the defendants had already shared out the family land. But that did not diminish or extinguish the plaintiff’s claim to the suit land. In **ISACK M’INANGA KEBIA .V. ISAAYA THEURI M’INTARI** (supra) the Court said:-

**“Each case has to be determined on it’s own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **KIARIE .V. KINUTHIA**, that what is essential is the nature of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land.”** Emphasis added.

Therefore, the fact that the plaintiff was not in occupation and possession of any portion of the suit land was not a licence to the defendants, as trustees, to abrogate their duty to him. His right is hinged primarily on the fact that the suit land is part of the ancestral land belonging to the **MASAI** family of which he is a member.

30. The defendants also appear to labour under the illusion that since they may have protected the family land from persons who were trying to grab it, they are entitled to a larger share than the plaintiff. This is what the 2<sup>nd</sup> defendant has said in paragraphs 14 and 15 of his statement dated 8<sup>th</sup> November 2019: -

14: **“That the land I occupy now I go it after several land disputes and cases with the family of the later **SIARA and NYONGESA KHWATENGE.**”**

15: **“That initially, I had only been given 5 acres of land and the rest of the land I obtained through my own sweat and**

*struggle.”*

Firstly, there was no evidence tendered to show that any member of the **MASAI** family was engaged in Court cases with strangers who attempted to grab their ancestral land. And Secondly, neither did the defendants prove that other than the inheritance from their father, they expended their own resources in acquiring other portions of land to supplement the ancestral land. On the contrary, the evidence shows that all the land they possess is ancestral land which was owned by **MASAI** prior to his death in 1945. Even if the defendants had fought off persons who wanted to invade the ancestral land, that was their duty as trustees. The first duty of a trustee is a fiduciary one by which he is bound to protect and manage the trust property in a responsible manner for the benefit of the beneficiaries. This is a duty which they owed the plaintiff and it is clear from the evidence that they did not discharge that responsibility as is required of trustees.

31. Is the plaintiff entitled to the orders sought in his plaint? Apart from protecting the ancestral land, the defendants also had a duty to render an honest account to all the beneficiaries including the plaintiff. The plaintiff having led credible evidence that the suit land was part of ancestral land to which he had a stake as a son of the late **MASAI**, the evidential duty under **Section 112** of the **Evidence Act** shifted to the defendants to demonstrate that they acted honestly and in good faith and to the benefit of the plaintiff. The onus to prove a trust was on the plaintiff as provided by **Sections 107** and **109** of the **Evidence Act**. The plaintiff, in my view, has discharged that burden. However, as to how much land the late **MASAI** owned prior to his death, that is a matter within the knowledge and control of the defendants. As I have already stated above, the defendants have maintained a studious silence as to exactly how much land their late father owned prior to his death. Yet full disclosure is paramount if the trustees are to perform their responsibilities in a transparent manner. **Section 112** of the **Evidence Act** provides that: -

**112** *“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”*

That is the evidential burden that was cast on the defendants. In the case of **MBUTHIA MACHARIA .V. ANNAH MUTUA & ANOTHER 2017 eKLR**, the Court of Appeal described it as follows: -

*“That legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.”*

In this case, whereas the plaintiff described the ancestral land held by their father as *“a jungle of piece of land measuring 229 acres”* as per paragraphs 11 and 12 of his statement, all that **JOHN MACHESO MAFUNGA (DW 1)** and **PATRICK MAFUNGA KHWATENGE (DW 2)** could state in paragraph 11 of their respective statements is: -

**11.** *“That to the best of my knowledge, my grandfather MASAI MACHESO never owned land measuring 229 acres as alleged by the plaintiff.”*

An on his part the 2<sup>nd</sup> defendant (**DW 3**) said as follows in paragraph 9 of his statement: -

**9:** *“That to the best of my knowledge, my father MASAI MACHESO never owned land measuring 229 acres as alleged by the plaintiff.”*

The plaintiff was six years old when his father died. He then went to work in Uganda in 1958 and when he returned home in 1960 and asked his brothers for his share of the ancestral land, they tosed him from one sibling to the other. Other than describing the plaintiff’s allegations as to the amount of land which their late father owned as being *“a lot of falsehoods,”* the defendants have not even attempted to show how much land their late father owned yet that is clearly a matter within their knowledge. The only conclusion that this Court can arrive at is that the defendants would not wish this information to be disclosed for reasons best known to themselves.

32. Whereas the defendants claim to have given the plaintiff 10 acres which he sold, the plaintiff’s case is that he was infact only given 3½ acres by the clan which he rejected. This is what he said when cross – examined by **MR MAKOKHA**: -

*“I was given 3½ acres. I came back in 1960 to Kenya, got married and returned to Uganda. It was in 1961 that I was given the 3½ acres by the village elder. But I never took possession. It is not true that JOTHAM MAFUNGA gave me 10 acres. It is not true that PETER WANYAMA bought the 10 acres from me.”*

**JOHN MACHESO MAFUNGA (DW 1)** was born in 1956. He does not know how much land his grandfather **MASAI** owned prior to his death and much of what he told the Court was what he was told by others. **PATRICK MAFUNGA KHWATENGE (DW 2)** admitted when cross – examined by **MR MURUNGA** that he was not conversant with what happened in 1961. The 2<sup>nd</sup> defendant **JOAB SIUNDU MACHESO (DW 3)** stated in his statement that in 1961, the clan gave the plaintiff 10 acres of land but in cross – examination by **MR MURUNGA**, he said: -

*“The plaintiff was given 8 acres. He was given by JOTHAM. I was not at the TRIBUNAL case. I was however present when the plaintiff was given 8 acres but I cannot recall because it was a long time ago. I don’t know if the plaintiff constructed a house on his 8 acres. I know that the plaintiff sold his 8 acres to PETER WANYAMA. I was not a witness at that transaction. I was also given 8 acres but I bought the 50.4 acres.”*

In paragraph 15 of his statement however, the 2<sup>nd</sup> defendant says: -

**15: “That initially, I had only been given 5 acres of land and the rest I obtained through my own sweat and struggle.”**

The contradictions in his statement are obvious. In their statements, the defendants’ two witnesses **PETER WANYAMA KHAKAME (DW 4)** and **JACKSON MUSUNGU MIKISI (DW 5)** claim that the plaintiff sold his 10 acres and used the proceeds to buy land at **MATULO** area. **PETER WANYAMA KHAKAME (DW 4)** who says he bought the 10 acres but the sale agreement was burnt in his house at **TURBO** during the 1992 land clashes could not however even avail any evidence of the registration number of the land yet in paragraph 22 of his statement he alleges: -

**22: “That I was duly registered as the absolute owner of the said 10 acres of land in 1965 when Land Adjudication of the land was done.”**

All the above was denied by the plaintiff in his statement dated 3<sup>rd</sup> March 2020 in which he went on to add that **PETER WANYAMA KHAKAME** is infact married to **JOTHAM MAFUNGA**’s daughter. The bottom line really is that land is a tangible and immovable object and the evidential burden having shifted to the defendants, as I have already stated above, the onus was clearly on them to avail records to show what land they allocated to the plaintiff as his share of their ancestral land. They have failed to do so yet they are the one who were the custodians of that land. The only inevitable and irresistible conclusion is that if those records were availed, they would have supported the plaintiff’s rather than the defendants’ case. It cannot be true, as submitted by Counsel for the defendants in paragraph 27 of his submissions, that the defendants’ **“witnesses were firm and consistent in their evidence and hence its clear that the plaintiff was given his share of the land and sold it to a third party and therefore the claim brought herein is purely an afterthought.”** I have already pointed out the contradictions in the defendants’ testimonies and the plaintiff’s case cannot be an **“afterthought”** by any standards when there is evidence, even from the defendants themselves, that the plaintiff’s clamour for his share of the ancestral land started way back in 1960 when he confronted his siblings before moving to the **TRIBUNAL** in 2011 and subsequently to this Court.

**33.** What disposal orders should the Court make with respect to the suit land?

**34.** Trust is about equity. Indeed, among the principles that guide this Court under **Section 18(a) (iv)** of the **Environment and Land Court Act** are: -

**“the principles of intergenerational and intragenerational equity.”**

The term equity is defined in **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION** as: -

**“Fairness; impartiality, evenhanded dealing .....**

**The body of principles constituting what is fair and right .....**”

The plaintiff has asked this Court to award him 10 acres from the land parcel **NO NDIVISI/MUCHI/1079** and 5 acres from the land parcel **NDIVISI/MUCHI/1621**. This Court would have been prepared to award him even more for the simple reason that no explanation has been placed before me as to why the defendants should, between them, be awarded 85 acres and the plaintiff only 15 acres. This Court will nonetheless award him the 15 acres that he seeks.

**35.** Having said so, however, **JOTHAM MAFUNGA MACHESO**’s land parcel **NO NDIVISI/MUCHI/1079** measures 14.8 Hectares (36.5 acres) while the parcel **NO NDIVISI/MUCHI/1621** belonging to the 2<sup>nd</sup> defendant **JOB SIUNDU MACHESO** measures 20.1 Hectares (49.6 acres). It is only fair that the 10 acres be hived off from the parcel **NO NDIVISI/MUCHI/1621** and the 5 acres from the land parcel **NO NDIVISI/MUCHI/1079**. That will ensure some reasonable parity in the manner in which the ancestral land is shared out among the siblings.

**36.** Ultimately therefore and having considered the evidence by all the parties herein, there shall be Judgment for the plaintiff against the defendants in the following terms: -

**1. A declaration is issued that the defendants hold the land parcels NO NDIVISI/MUCHI/1079 and NDIVISI/MUCHI/1621 in trust for themselves and for the plaintiff.**

**2. The trust is determined.**

**3. JOHN MACHESO MAFUNGA and PATRICK MAFUNGA KHWATENGE shall within 30 days of this Judgment execute all the necessary documents to facilitate the transfer 5 acres out of the land parcel NO NDIVISI/MUCHI/1079 into the names of the plaintiff.**

**4. JOB SIUNDU MACHESO shall also within 30 days of this Judgment execute all the necessary documents to facilitate the transfer of 10 acres out of the land parcel NO NDIVISI/MUCHI/1621 into the names of the plaintiff.**

**5. The Land Registrar and County Surveyor Bungoma shall excise 5 acres out of the land parcel NO NDIVISI/MUCHI/1079 and 10 acres out of the land parcel NO NDIVISI/MUCHI/1621 and register the same in the names of the plaintiff.**

6. In default of (3) and (4) above, the Deputy Registrar shall execute all the necessary documents on behalf of JOHN MACHESO MAFUNGA, PATRICK MAFUNGA KHWATENGE and JOB SIUNDU MACHESO to facilitate the transfer of the above parcels in the names of the plaintiff.

7. As the parties are family, each shall meet their own costs.

**BOAZ N. OLAO.**

**J U D G E**

**1ST FEBRUARY 2022.**

Judgment dated, signed and delivered at **BUNGOMA** on this 1<sup>st</sup> day of February 2022 by way of electronic mail in keeping with the **COVID – 19** protocols.

Right of Appeal explained.

**BOAZ N. OLAO.**

**J U D G E**

**1<sup>st</sup> February 2022.**